Sup. Ct. 45.

Supp. Brief of Maltbie & Mitchell for Petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1899.

Office Supreme Court
FILED
JAN 15 1900
JAMES H. McKENNEY,
Clerk

Filed Jan. 15 1900.

No. 145.

H. DRUSILLA MITCHELL,
PETITIONER,

VS.

THE FIRST NATIONAL BANK OF CHICAGO,
RESPONDENT.

Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

SUPPLEMENT TO BRIEF FOR PETITIONER.

THEODORE M. MALTBIE,
CHARLES E. MITCHELL,
Of Counsel.

HARTFORD, CONN.:
Press of THE HARTFORD PRINTING COMPANY,
(ELIHU GEER SONS.)
1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 280.

H. DRUSILLA MITCHELL, *Petitioner*,

vs.

THE FIRST NATIONAL BANK OF CHICAGO,

Respondent.

Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

SUPPLEMENT TO

BRIEF FOR THE PETITIONER.

In response to a suggestion at the former argument of this case, we submit this further statement as to the statutes of Connecticut relating to the disabilities of married women.

An act was passed, in 1872, and has since continued in force, which provided that:

> "Actions at law may be sustained against any married woman upon any contract made by her upon her personal credit for the benefit of herself, her family, or her estate." *General Statutes of Conn.*, § 984.

The effect of this statute was to give an action at law against married women in cases where a proceeding in equity against her property could previously have been maintained.

In 1873, this act was held to have this effect, by the Supreme Court, in *Buckingham vs. Moss, 40 Conn. 461, 463*, where the court, speaking of this statute, says:—"The act of 1872 was not intended to create, and we think did not create, any new liability. It imposes no duty, no obligation, which did not previously exist. It simply changes the form of the remedy. The party plaintiff in cases of this kind is authorized to proceed on the law instead of the equity side of the court."

In order to maintain an action at law under the authority of this statute, it is indispensable to allege in the complaint that the contract was made for the benefit of the person, family or estate of the married woman.

In 1878, in *Smith vs. Bank of New England, 45 Conn. 416*, the court say:—"The alterations made by the statutes relative to married women constitute exceptions to the general rule, and the allegations in the declaration must explicitly bring the case within one of the exceptions" * * * "the want of such allegation makes the declaration fatally defective." This was held to be the law on a motion in arrest of judgment after verdict.

In 1879, in *Way vs. Peck, 47 Conn. 23, 24*, the court, in discussing this statute, said:—"The facts appearing of record must bring the case within the provisions of the statute which makes a married woman liable upon any contract made by her since her marriage upon her personal credit for the benefit of herself, her family, or her separate or joint estate."

The court also said, in 1879, in *Gore vs. Carl, 47 Conn. 291*, —"It is not the purpose of this act to remove all defences standing about a married woman and leave her and her estate responsible for any and every contract she can be persuaded to enter into."

The last three cases were decided after the passage of the act of 1877, and while it was in force, and related to the capacity of women married prior to that time. The act of 1877 applied only to "*marriages on or after April 20, 1877*," (General Statutes, § 2796,) and did not enlarge the capacity of Mrs. Mitchell, who was married in 1857. *Opinion of Supreme Court of Errors of Connecticut, Record, p. 33.*

The counsel of the respondent, in their brief, p. 10, say that this is "Not a question whether Mrs. Mitchell can make a contract of guaranty in Connecticut. We do not claim that she could." In view of these decisions and the concession of the respondent, this court must hold that Mrs. Mitchell was absolutely incapable of binding herself by contract, and especially by a contract of guaranty, within the state of Connecticut.

The parties are agreed in this case as to the facts and the law of Connecticut: — *Record p. 27.*

1. That Mrs. Mitchell signed the contract in suit at her domicil in Connecticut.

2. That she did so at the request of her husband, who was one of the firm of Morse, Mitchell & Williams, and who brought the paper to her, secured her signature, took it away, and mailed it to Chicago.

3. That Mrs. Mitchell was incapable of making such a guaranty in Connecticut, and that the alleged contract was void, under the laws of that state.

We might add that it does not appear that Mrs. Mitchell had anything to do with the delivery or disposition of the alleged guaranty, and it is admitted that the respondent gave no additional credit on account of it.

The respondent bank was a party to the arrangement to procure Mrs. Mitchell to sign the proposed guaranty at her domicile in Connecticut, and was put upon inquiry as to her capacity, and must have known her disabilities as a married woman in

Connecticut. The finding of facts *(Record, p. 27, par. 6,)* states that an agreement between the respondent bank and the debtor partnership was made at Chicago, Mrs. Mitchell having no knowledge thereof, by which the guaranty, prepared by the bank, upon its form, should be taken to Mrs. Mitchell, whom the bank knew to be a married woman and to be at her domicile in Connecticut, and, in that state, she should be procured to sign the same.

The claim of the respondent is that the void paper became a valid contract in Illinois, binding upon Mrs. Mitchell by force of the statute of that state, which provides that "Contracts may be made and liabilities incurred by a wife and the same enforced against her to the same extent and in the same manner as if she was unmarried." This statute is entirely personal in character, and limited in its operation to the territory of Illinois, and can have no extra-territorial effect. It could not confer capacity upon Mrs. Mitchell while she was in Connecticut, and without possession of capacity by her, no contract could exist. Judge Story says in his *Conflict of Laws*, § 7, "It is plain that the laws of one country can have no intrinsic force *proprio vigore*, except within the territorial limits and jurisdiction of that country. They can bind only its own subjects and others who are within its jurisdictional limits; and the latter only while they remain therein."

So long as she continued incapable of making the contract of guaranty, no manipulation of the signed paper in Illinois, by other persons, could give it validity as a contract. This court, in discussing another question in *Fire Ins. Asso. vs. Wickham, 141 U. S. 564, 579*, said "to constitute a valid agreement there must be a meeting of minds upon every feature and element of such agreement." Manifestly, a person incapable of contracting could not assent to a contract, and there could not be a meeting of minds.

Carson vs. Clark, 2 Ill. 115.
Toledo, etc. R. R. Co. vs. Lamphear, 54 Mich. 575.

The case of *Milliken vs. Pratt, 125 Mass. 374*, upon which the respondent relies, turned upon the effect of a statute of Mass., passed in 1874. The guaranty was signed before the enactment of the statute, and suit brought subsequent thereto. The court say, *p. 376*, "The law of Maine authorized a married woman to bind herself by any contract as if she were unmarried. *St. of Maine of 1866, c. 52. Mayo vs. Hutchinson, 57 Maine, 546.* The law of Massachusetts, as then existing, did not allow her to enter into a contract as surety or for the accommodation of her husband or of any third person. *Gen. Sts. c. 108, § 3. Nourse vs. Henshaw, 123 Mass. 96.* Since the making of the contract sued on, and before the bringing of this action, the law of this commonwealth has been changed, so as to enable married women to make such contracts. *St. 1874, c. 184. Major vs. Holmes, 124 Mass. 108. Kenworthy vs. Sawyer, ante, 28.*" Then, in stating the question to be decided, the court says: *p. 377.*—"The question therefore is, whether a contract made in another state by a married woman domiciled here, which a married woman was not at the time capable of making under the law of this commonwealth, but was then allowed by the law of that state to make, and which she could now lawfully make in this commonwealth, will sustain an action against her in our courts."

In Connecticut there is no counterpart of the statute which was essential to this Massachusetts decision; in fact, was the reason and occasion for its being rendered.

It is proper to remark that the cases cited in the opinion as authorities for the power to contract by agent, messenger or letter, all concern parties of full capacity; no authority is or can be cited which holds that an incapable person, in the country of such incapacity, could appoint an agent, or contract by messenger or letter. Twenty-two years have elapsed since *Milliken vs. Pratt* was decided. During this period a very large number of cases involving questions relating to the capacity of married women or infants have been decided by the courts of last resort in the several states, the exponents of the common law in this country. These decisions invariably sus-

tain the view stated by the Supreme Court of Errors of Connecticut in *Freeman's Appeal, 68 Conn. 533, (Record, p. 33.) See cases cited pp. 12, 13, Petitioners principal brief.*

The tenacity with which these state courts adhere to the established rules of the common law relating to the disabilities of married women is illustrated by the action of the Supreme Judicial Court of Massachusetts in reference to a reservation contained in the statute of 1874, which statute was the basis of the decision in *Milliken vs. Pratt.* The reservation provides that "nothing in this act shall authorize a married woman to convey property to or make contracts with her husband." *Mass. St. 1874, c. 184.* It was said in *Fowle vs. Torrey, 135 Mass. 87, 90,* that "whatever rights they (married women) had in this respect remain as they stood at common law before this legislation commenced." The case of *National Granite Bank vs. Whicher, 173 Mass. 517,* (1899), was an action on three promissory notes, signed by the defendant, a wife, payable to the order of her husband, and endorsed by him and other persons, and discounted by the plaintiff bank. The Court said:—"That such a note is void by common law, which law has not been changed by our statutes relating to married women, is too plain for argument. *Gay vs. Kingsley, 11 Allen 345.* Nor does it make any difference that the note after being indorsed by the husband is given to a person in payment of a debt of hers to him. *Roby vs. Phelon 118 Mass. 541.*" The conclusion is "that the notes in suit having been made by a wife payable to the order of her husband no action could be maintained against her upon them."

The language used by the Massachusetts court is almost identical with that used by the Connecticut court in *Freeman's Appeal,* in holding the alleged guaranty void.

Further, the court say that:—"*In Slawson vs. Loring, 5 Allen 340,* on which the plaintiff chiefly relies, it was held that an indorsement of a draft from a husband to his wife and her

subsequent indorsement of it with his assent to a third person were sufficient to vest in the latter a valid title. This case as an authority has been limited to its particular facts."

Clearly, if these absolutely void notes had been discounted by a bank located in the state of Maine, they would not have become, by force of the law of Maine, valid obligations which could be enforced in the courts of Massachusetts. They would still have been void and their enforcement in the courts of Massachusetts would have been against the settled policy and law of the state, and not required by rules of comity.

Practically, if an incapable married woman, at her domicile, by signing a paper and sending it to a state where married women are capable of contracting, may make a valid contract which can be enforced against her in the state of her domicile and incapacity, then the disability is not of the *feme covert*, but of the territory of the state and its citizens within which she resides.

The Circuit Court of Appeals in its opinion in this case, two judges concurring and Judge Lacombe dissenting, not only found error in the judgment of the Circuit Court, but also reviewed and practically found error in and overruled the decision and unanimous opinion of the Supreme Court of Errors of Connecticut upon all the questions involved in this case, which last decision was given at the invitation of the respondent by the state court in *Freeman's Appeal, (Record, p. 33.)* That adjudication by the Connecticut Court, has been the subject of consideration at every stage of the proceedings in this case in the federal courts. It was before the Circuit Court, and was fully considered in all its aspects. It was before the Circuit Court of Appeals, and is the one subject which that court considered. It is here before this court in a full and exemplified copy of the record in the state court, made a part of the record here. Now, while it probably is true that the conclusions of the Connecticut court, in *Freeman's Appeal* are not a sufficiently formal judgment to be the basis of an action, or to be plead

in bar to further proceedings, yet, upon issues that were precise and clear, certain questions were adjudicated. The rule is that the decision of any essential question in one action is conclusive between the parties in all subsequent actions.

Cromwell *vs.* Sac County, 94 U. S. 351.
Lumber Co. *vs.* Buchtel, 191 U. S. 638.
Nesbit *vs.* Riverside Independent District, 144 U. S. 610.
Johnson Co. *vs.* Wharton, 152 U. S. 252.
Last Chance Mining Co. *vs.* Tyler Mining Co., 157 U.S. 683, cases cited, p. 7, Petitioner's principal brief.

These adjudicated questions constitute an estoppel, and, as we understand, may be offered in evidence without being specially plead. The decision of these questions can only be used to shut off an action or defense, and stand upon the same ground as an estoppel *in pais*.

S. Pacific R. R. Co. *vs.* United States 168 U. S. 1, 48, 49, 59.
Plumb *vs.* Curtis, 66 Conn. 154, 173.
Bell *vs.* Raymond, 18 Conn. 91, 97.

The opinion of the Circuit Court of Appeals says:—In "*Freeman's Appeal*, he court conceded it (the alleged guaranty) was a contract made in Illinois" (Record, p. 18.) This is incorrect, as the purpose of the opinion in *Freeman's Appeal* was to declare that Mrs. Mitchell was incapable of making a contract and that the alleged guaranty was void. (Record, p. 32.) Judge Wallace also says "that the state court did not consider the contract one which ought not to be enforced because violative of the policy of the state." This is also error, as the state court, although denying that any contract existed, still said that "no principle of comity can require a state to lend the aid of its courts to enforce a security which rests on the transgressions of its own law by one of its own citizens committed within its own territory." (Record, p. 35.)

This was an emphatic declaration of the position of the

state and of its policy in reference to contracts of this character; and that no rule of comity required their enforcement in the State Courts. The rule in reference to the exercise of comity in the state was first stated in *Vermont State Bank vs. Porter, 5 Day 316, 320, (1812)*, and is reiterated in *Vanbuskirk vs. Hartford Fire Ins. Co., 14 Conn. 583, 587, (1842)*, where the court say: "The rule that the law of one nation will be carried into effect in the territories of another is, however, subject to some exceptions. The only one which can have any application to this case, is, that it will not be allowed to prevail where it will be manifestly injurious to the state where it is sought to be enforced, or to its citizens. Whether the adoption of it will be thus injurious in its consequences, is, for the Courts of such state, in the exercise of a sound judicial discretion, to determine."

The rule in Connecticut is the same as that in *2 Kent's Commentaries, (12 Ed.) 455, 457, 458*, that "A contract valid by the law of the place where it is made is, generally speaking, valid everywhere *jure gentium* and by tacit assent." "It is, however, a necessary exception to the universality of this rule, that no people are bound to enforce or hold valid in their courts of justice any contract which is injurious to their public rights or offends their morals or contravenes their policy or violates a public law." Then again, "Every independent community will judge for itself how far the *comitas inter communitates* is to be permitted to interfere with its domestic interests and policy."

"No state is bound to give effect to the law of a foreign state when to do so will prejudice either the rights of its citizens or the interests of the state; but, on the contrary, each state is bound to give its citizens the full benefit of all the remedies and securities provided by its laws."

Receiver vs. First National Bank, 34 N. J. Eq. 450.

In *Bliss vs. Brainard, 41 N. H. 256, 261*, the rule is thus stated:—"Generally speaking, the validity or invalidity of a

contract is to be determined by the law of the place where it is made. If valid there, it is, by the general law of nations, held to be valid everywhere, by the tacit or implied consent of the parties; if void or illegal there, as a general rule, it is held void and illegal everywhere. The exception to this rule as to the validity of the contract is, that contracts which are in evasion or fraud of the laws of the country, or of the rights or duties of its subjects; which are against good morals, or against religion, or against public rights; and those opposed to the national policy or national institutions; are deemed nullities in every country affected by such considerations, though they may be valid by the laws of the place where they are made. But if a contract is void in its origin, it seems difficult to find any principle upon which any subsequent validity can be given to it in any other country.

Story, "Conflict of Laws," §§ 242–244, and authorities cited;

Andrews *vs.* Herriot, 4 Cow. 508 and note to page 510;

2 Kent Com. 457, and notes;

Whitney *vs.* Whitney, 35 N. H., 457, and authorities.

Hilton vs. Guyot, 159 U.S. 113, 166.

The Connecticut Court, in *Freeman's Appeal*, stated the law and the rules of comity as they have existed for a hundred years, and now exist, in Connecticut, and this statement must be accepted as conclusive. No question can be made as to the absolute incapacity of Mrs. Mitchell during the entire period of coverture, and that any contract she might attempt to make would be absolutely void; and that such a contract could not be enforced in that state under any rule of comity. The rule of comity is determined by the state, and the federal courts with jurisdiction in the state are required to conform to such rule.

Mahon vs. Justice, 127 U. S. 700, 706.

See cases cited in Petitioner's principal brief, pp. 17-20.

If, despite the opinion and judgment of the Connecticut court, this court holds that the Illinois statute made this signed paper a guaranty binding upon Mrs. Mitchell in Connecticut,

we submit that, as such a contract contravenes the law and settled policy of Connecticut, and could not be enforced in the courts of that state, it cannot be enforced in a federal court sitting in that state.

This court, in *Smith etc. vs. McGroarty, 136 U. S. 237, 241,* discussing the validity of a conveyance, said:—"It would be an extraordinary result, if the courts of the United States, in exercising the jurisdiction conferred upon them with a view to secure the rights of citizens residing in different states, should hold such a conveyance to be valid against citizens of other states as the Supreme Court of Ohio holds to be void as against its own citizens." See also Cross *vs.* Allen, 141, U. S. 528, 538.

Would not the result also be extraordinary if a federal court should hold a writing to be a contract in Connecticut in favor of citizens of other states, which its Supreme Court of Errors had declared not to be a contract and void as against one of its own citizens, and a transgression of the laws of the state. Would not the result be more extraordinary if the federal court should judicially approve the violation of the state law and sovereignty, and afford to citizens of other states a right of action which did not exist in favor of the citizens of the state, or in favor of any one in the state courts.

THEODORE M. MALTBIE,
CHARLES E. MITCHELL,
Of Counsel.